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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

—v.—

PREDRAG STEVIC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
and INTERNATIONAL HUMAN RIGHTS LAW GROUP,
AMICI CURIAE, IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICI*

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States.

The International Human Rights Law Group ("IHRLG"), a nonprofit, public interest law office established in Washington, D.C. in 1978, seeks to promote respect for and adherence to human rights norms in all nations including the United States.

At issue in this case is the determination of the applicable standard which must be satisfied by an alien seeking political asylum in order to avoid deportation. The standard adopted by this Court is crucial, not only to the long-standing tradition in American jurisprudence of protecting individual liberties from abuse, but particularly to aliens who face

* The parties have consented to the filing of this Brief, and their letters of consent have been filed with the Clerk of the Court under Rule 36.2 of the Rules of this Court.

severe deprivations of liberty both from deportation itself and from what can and often does occur to them thereafter.

Because the ACLU and the IHRLG believe that the issue here was correctly decided by the U.S. Court of Appeals for the Second Circuit, amici submit this brief in support of respondent and urge affirmance of the judgment below.

SUMMARY OF ARGUMENT

The applicable standard for resolving requests of political asylum is the "well-founded fear" of persecution standard, a standard which is supported by this Court's repeated recognition of the importance of safeguarding individual liberties against the risks of factfinding error, and which is compelled by Congress' express adoption of this international law standard in the Refugee Act of 1980.

1. In this Court's burden of proof decisions, see, e.g., Woodby v. INS, 385 U.S. 275 (1966) (deportation); see also, Santosky v. Kramer, 455 U.S. 745 (1982) (termination of parental rights); Addington v. Texas, 441 U.S. 418 (1979) (civil commitment), the Court has continuously safeguarded individuals and their liberties by imposing the risks of an erroneous factual determination on the government rather than upon the individuals whose liberties were threatened. This historic tradition of our American jurisprudence compels that the standard applicable to resolving requests for political asylum be the "well-founded fear" of persecution standard which provides greater safeguards for individual liberties than the government's proposed standard of requiring individuals to meet a "clear probability of persecution" standard which places the risk of an erroneous factual determination not on the government but on the very individuals whose liberty interests are at stake.

2. The varyingly stringent standards applied to political asylum requests prior to 1980 were modified by Congress' enactment of the Refugee Act of 1980 which adopted the internationally used definition of refugee. That definition expressly includes the "well-founded fear" standard set forth in the U.N. Protocol Relating to the Status of Refugees ("U.N. Protocol").

a. Prior to the Refugee Act of 1980, the courts, the Board of Immigration Appeals ("BIA"), and the Immigration and Naturalization Service ("INS"), applied statutorily unauthorized, and ordinarily stringent standards to different classes of aliens seeking political asylum.

b. Through its enactment of the Refugee Act of 1980, Congress consolidated the classes of individuals seeking asylum under a single standard, eliminated the previously divergent standards for resolving requests of political asylum, and expressly

adopted the U.N. Protocol definition of "refugee" entitled to asylum as an alien who has a "well-founded fear of being persecuted." Aware that this definition required no further alteration of statutory law but only administrative implementation, Congress was confidently able to insure thereafter "that U.S. law clearly reflects our legal obligations under International agreements," H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979).

ARGUMENT

The issue presented in this case invites the Court to determine the standard which must be satisfied by an alien seeking political asylum in order to avoid deportation. The answer to this question is crucial, not only to the long-standing tradition in American jurisprudence of protecting against deprivation of individual liberties, but more particularly to aliens who face drastic deprivations of liberty both from the act of deportation as

well as from the consequences which may befall them thereafter.

Throughout its Brief for the Petitioner, the government argues that an alien seeking political asylum essentially should be required to prove a "clear probability of persecution" rather than the less stringent standard of a "well-founded fear" of persecution, and also that, in any event, the different standards actually are not at all significantly different. Contrary to the government's statutory argument, we submit that Congress quite specifically intended the "well-founded fear" standard when it enacted the Refugee Act of 1980. Supportive of this standard, we further submit, is this Court's repeated recognition of the importance of protecting individual liberties when judicially allocating burdens of proof, judicial determinations which are analogous to the determination of the applicable standard here.

I. In Allocating Burdens of Proof --
Determinations Analogous to and Which
Have an Effect Similar to the Deter-
mination of the Applicable Standard
Here -- This Court Has Consistently
Recognized the Fundamental Importance
of Safeguarding Individual Liberties

Determining the applicable standard which must be met by aliens applying for political asylum in order to avoid deportation -- whether a "clear probability of persecution" standard urged by the government, or the "well-founded fear" of persecution standard set forth in the Refugee Act of 1980 -- is not necessarily a matter only of statutory interpretation. Rather, since the determination of the standard involves the same elements present in allocating burdens of proof, the legal principles governing burdens of proof constitute a compelling framework for the determination here. Consideration of these procedural fairness principles in determining the standard for political asylum in turn compels the adoption here of a standard no less harsh than the "well-founded fear" of persecution standard.

"The function of a standard of proof," this Court declared in Addington v. Texas, 441 U.S. 418 (1979), "is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." 441 U.S. at 423, quoting from In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). As this Court later observed, Addington teaches that the standard of proof applied reflects "a societal judgment about how the risk of error should be distributed." Santosky v. Kramer, 455 U.S. 745, 755 (1982).

These same considerations -- our societal judgments about reaching correct factual conclusions weighed against who should bear the risk of error -- attend the determination here of the applicable standard for resolving requests for political asylum. Even more relevant here, as the Court summarized in Santosky v. Kramer, 455 U.S. 745 (1982), is

the "level of certainty necessary to preserve fundamental fairness in a variety of . . . proceedings that threaten the individual involved with 'a significant deprivation of liberty.'" 455 U.S. at 756, quoting from Addington v. Texas, 441 U.S. 418, 425 (1979) (civil commitment), and citing Woodby v. INS, 385 U.S. 276, 285 (1966) (deportation); Chaunt v. United States, 364 U.S. 350, 353 (1960) (denaturalization); Schneiderman v. United States, 320 U.S. 118, 125 (1943) (denaturalization).

There of course is no question that deportation involves a significant deprivation of liberty. "As the Court has emphasized, 'deportation is a drastic measure and at times the equivalent of banishment or exile.'"

Costello v. INS, 376 U.S. 120, 128 (1964), quoting from Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948). In fact, the deprivation caused by deportation is not only the loss of liberty occasioned by removal from this country but

also the loss that can and often does occur thereafter. "This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification." Woodby v. INS, 385 U.S. 276, 285 (1966).

Based upon the severity of the deprivations caused by deportation, this Court in Woodby v. INS allocated the burden of proof in a manner which placed the risk of error in reaching factual conclusions on the government rather than on the individual whose liberties were threatened. Specifically, in determining the degree of proof which must be established by the government in a deportation proceeding, the Woodby Court rejected the government's proposed "mere prepondence of the evidence" standard and instead required the government to "establish the facts supporting deportability

by clear, unequivocal, and convincing evidence." 385 U.S. at 277, 285-86; see also, Santosky v. Kramer, 455 U.S. at 748 (similarly imposing on the government the "clear and convincing evidence" proof requirement in proceedings involving the termination of parental rights).

Although the standard of proof here is one which must be met not by the government but rather by the alien seeking political asylum in order to avoid the deprivations of deportation, the analyses used and the conclusions reached by this Court in such cases as Woodby and Santosky with regard to the degree of proof are fully appropriate to determining which standard of proof should be applicable here.

Under the government's formulation, the risk of error in determining the standard for political asylum should be borne by the very individuals whose liberty is threatened not only by deportation from this country as in Woodby v. INS, but by the political aftermath

of deportation as well. The government's argument, however, does not withstand this Court's analysis. The teachings of this Court, based on our traditions and on our society's historical judgments favoring the protection of individuals and their liberties, compel rejection of the government's proposed standard.

II. The Refugee Act of 1980 Specifically Adopted the Language of the U.N. Protocol Which Requires Evaluation of Political Asylum Requests Based on an Individual's "Well-Founded Fear of Being Persecuted"

The government in its Brief for the Petitioner at 8-11, 20-32, asserts that the varyingly stringent standards adopted by several lower courts are consonant with or at least not significantly different from the "well-founded fear" of persecution standard set forth in the U.N. Protocol and expressly incorporated into the Refugee Act of 1980.

The incorrectness of the government's argument is revealed in the quite distinct and stringent standards actually applied prior to the Refugee Act of 1980. The government's argument is also rebutted by Congress' express intent to insure through the Refugee Act of 1980 "that U.S. law clearly reflects our legal obligations under International agreements," H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979).

A. Prior to the Refugee Act of 1980, the Courts, the BIA and the INS, and the U.N. Protocol Used Varying Standards in Evaluating Requests for Political Asylum

1. Under the Immigration and Nationality Act of 1952, There Was No Reference to a Proper Standard for Political Asylum

An analysis of American asylum law compels the conclusion that prior to the Refugee Act of 1980 there was no clear statutory provision which determined the proper standard to be applied in evaluating requests for political

asylum based on an alleged fear of persecution. Before 1968, the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952), contained two statutory provisions governing political asylum. The first, Section 243(h), 8 U.S.C. § 1253(h) (1952), governed deportable aliens already in this country. The second relevant provision, Section 203(a)(7), 8 U.S.C. § 1153(a)(7) (1952), governed the admission of aliens seeking political asylum who were not already in this country. The latter provision, Section 203(a)(7), stated:

(a) Aliens who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows:

(7) Conditional entries shall next be made available by the Attorney General . . . to aliens who satisfy an Immigration and Naturalization Service officer . . . (A) that (i) because of persecution or fear or persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated

country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion.

8 U.S.C. § 1153(a)(7) (1952) (emphasis added).

Under relevant INS decisions, a fear of persecution -- the standard under 203(a)(7) -- required only a showing of "good reason" for such fear. See, e.g., In re Ugricic, 14 I. & N. Dec. 384, 385-86 (Dist. Dir. 1972); In re Adamska, 12 I. & N. Dec. 201 (Reg. Comm'r 1967).

Prior to its amending in 1980, Section 243(h) stated:

The Attorney General is authorized to withhold deportation of any alien . . . to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion

8 U.S.C. § 1253(h) (1952) (emphasis added).

Section 243(h) was interpreted by the courts as requiring a showing of a "clear probability of persecution." Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390

U.S. 1003 (1968); Lena v. INS, 379 F.2d 536 (7th Cir. 1967).

The legal standard under Section 203(a)(7) accordingly was considerably less stringent than the "clear probability" test the courts read into Section 243(h). This discrepancy was explicitly recognized by the BIA in its decisions. See, e.g., In re Tan, 12 I. & N. Dec. 564 (BIA 1967).

Despite the lack of any specific language in the statute, the courts and the BIA developed two distinct criteria for evaluating requests for political asylum under Section 243(h). The BIA and INS consistently used a "likelihood of persecution" test. See, e.g., In re Janus and Janek, 12 I. & N. Dec. 866, 873 (BIA 1968); In re Kojoory, 12 I. & N. Dec. 215, 220 (BIA 1967). The courts, on the other hand, used the harsher "clear probability of persecution standard." See, e.g., Cheng Kai Fu v. INS, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

2. There Was No Basis for
the "Clear Probability
of Persecution" Test
Inexplicably Adopted by
the Courts

The "clear probability of persecution" test used by the courts originated in two 1967 cases. Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968), and Lena v. INS, 379 F.2d 536 (7th Cir. 1967). In Lena, the court reviewed an order of the INS denying a stay of deportation. The court, without citing any authority, set forth the proposition that the Attorney General "restricts favorable exercise of his discretion to cases of clear probability of persecution of the particular individual petitioner." 379 F.2d at 538. In the second case to invoke the "clear probability of persecution" language, Cheng Kai Fu v. INS, the court determined whether three aliens had succeeded in sustaining their burden of showing some likelihood that reopening the proceedings would result in a stay of deportation. The court affirmed

the order of the BIA denying a motion to reopen deportation proceedings. Since the Cheng Kai Fu court was not confronted with the validity of the "clear probability of persecution" test, its mention of the "clear probability" standard -- for which Lena was cited as authority -- was dictum. Nevertheless, these two cases gave rise to an extensive progeny that gives credence to the "clear probability" standard.

3. The BIA and the INS Applied
a "Likelihood of Persecution"
Standard

Unlike the courts, the BIA and the INS consistently applied a standard which they characterize as a "likelihood of persecution." See, e.g., In re Janus and Janek, 12 I. & N. Dec. 866, 873 (BIA 1968); In re Kajoory, 12 I. & N. Dec. 215, 220 (BIA 1967). The "likelihood of persecution" test focuses on the extent to which the alleged fear of persecution is supported by objective facts. The applicant

is required to substantiate his subjective fears with objective evidence. Such evidence could take various forms. For example, previous persecution of the individual alien, or persecution of his family, or evidence of persecution of members of a group or class to which the alien belongs, or evidence of activities engaged in by the alien after he left the country that indicated a likelihood that he would be persecuted if he returned.

See In re Janus and Janek, 12 I. & N. Dec. 866 (BIA 1968); In re Salama, 11 I. & N. Dec. 536 (BIA 1966). The courts' "clear probability" phraseology represents a more stringent standard than the BIA's "likelihood of persecution" formulation. But see Rejaie v. INS, 691 F.2d 139 (3d Cir. 1982).

4. The U.N. Protocol Articulated a "Well-Founded Fear" of Persecution Test

The U.N. Protocol Relating to the Status of Refugees, 606 U.N.T.S. 268, which the U.S.

acceded to in 1968, 19 U.S.T. 6223, sets out a "well-founded fear" as the proper standard to be applied in determining requests for political asylum based on a fear of persecution. The language of the U.N. Protocol is considerably more generous than the "clear probability" test applied by the courts. It approaches the language of what was previously Section 203(a)(7).

The definition of "refugee" adopted in the U.N. Protocol is a person who,

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality.

U.N. Protocol Relating to the Status of Refugees, 606 U.N.T.S. 268. This definition of refugee is identical to the definition adopted earlier in the 1951 U.N. Convention Relating to the Status of Refugees, 189 U.N.T.S.

150.^{1/} The internationally accepted definition of refugee, as well as the history of the 1951 Convention's definition of refugee demonstrates that a showing of "good reason" to fear persecution was the threshold that an alien must meet. United Nations Economic and Social Council, Report of the Ad Hoc Committee on Statelessness and Related Problems 39 (1950) (E/1618; E/AC 32/5). Hence, although the U.N. Protocol used the "well-founded fear" language, the standard under the U.N. Protocol is essentially synonymous with that of the old Section 203(a)(7). As we have already established, the standard under Section 203(a)(7) was substantially different from the courts' "clear probability" interpretation of Section 243(h). Nevertheless, in In re Dunar, 14 I. & N. Dec. 310 (BIA 1973), the BIA considered whether the "clear probability" and the

1. Although the United States never formally acceded to the Convention itself, this Convention is the basis for the U.N. Protocol to which the United States did accede in 1968.

"well-founded fear" standards were at all distinct. The BIA erroneously concluded that, because a showing of "well-founded fear" demanded objective evidence to substantiate a subjective fear, the two standards were essentially the same.

In 1968, the United States acceded to the U.N. Protocol. Thereafter, given the foregoing conflicting interpretations, it became apparent to legislators that the spirit and the letter of the U.N. Protocol were not being conformed to. It was this concern that prompted the enactment of new legislation that would bring U.S. laws within the confines of the U.N. Protocol.

B. The Legislative History of the Refugee Act of 1980 Evidences Congressional Intent to Bring U.S. Law into Compliance with the U.N. Protocol

The legislative history of the Refugee Act of 1980 indicates Congress' intent not only to rewrite statutory provisions regarding

political asylum, but to conform American asylum law to the language of the U.N. Protocol. That Congress intended the regulations and procedures relating to political asylum to be changed to conform to the standards of the U.N. Protocol is evident in the Conference Report accompanying the Refugee Act of 1980.

It states:

The Senate bill provided for withholding deportation of aliens to countries where they would face persecution The conference adopts the House provision with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistently with the Protocol.

Joint Explanatory Statement of the Committee of Conference, S. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980) (emphasis added).

The changes in asylum law embodied in the Refugee Act of 1980 began with the adoption of a uniform definition of "refugee." Congress specifically adopted the definition of refugee accepted under the U.N. Protocol. As is stated in the Conference Report:

The Senate Bill incorporated the internationally-accepted definition of refugee contained in the U.N. Convention and Protocol Relating to the Status of Refugees.

The House amendment incorporated the U.N. definition.

The Conference substitute adopts the House provision.

Id. at 19. As amended, Section 201(a)(42) of the 1980 Act incorporates the newly adopted definition of "refugee." It states:

The term "refugee" means (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (1952), as amended by Refugee Act of Mar. 17, 1980, Pub. L. No. 96-212, 94 Stat. 102 (emphasis added).

The statutory changes occasioned by the Refugee Act established as law those changes envisioned when the United States, in 1968,

acceded to the U.N. Protocol.^{2/} This congressional intent is evident from the House Report accompanying the Refugee Act of 1980:

(2) Withholding of Deportation.

Related to Article 33 is the implementation of section 243(h) of the Immigration and Nationality Act. That section currently authorizes the Attorney General to withhold the deportation of any alien in the United States to any country where, in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion.

Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention.

2. The government argues that accession to the U.N. Protocol in 1968 was premised on the understanding that such action would not substantively alter American immigration laws. The government in its Brief for the Petitioner at 26 relies on the testimony of Laurence A. Dawson, Acting Deputy Director of the Office of Refugee and Migration Affairs of the U.S. Department of State, S. Exec. Rep. No. 14, 90th Cong., 2d Sess. (1968). His assurance that the Attorney General will be able to administer provisions in the Protocol without necessitating amendments to American immigration or asylum law means that, because there was no statutory standard for accepting applicants for political asylum, the U.N. Protocol standard could be administratively adhered to without the need for substantive statutory changes.

H.R. Rep. No. 608, 96th Cong., 1st Sess. 18
(1979) (emphasis added).

As part of Congress' comprehensive revision of asylum law, Section 243(h) also was substantially amended to conform it to Article 33 of the 1951 Convention. Under the new language the Attorney General no longer was delegated discretionary authority:

The Attorney General shall not
deport or return any alien to a
country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Immigration and Nationality Act, 8 U.S.C. § 1253(h), as amended by Refugee Act of Mar. 17, 1980, Pub. L. No. 96-212, 94 Stat. 102 (emphasis added).

These substantive changes in asylum law, particularly in Section 243(h), were deemed "necessary so that U.S. law clearly reflects our legal obligations under International agreements." H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979).

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Second Circuit should be affirmed.

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Respectfully submitted,

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